



## Alert | Multidisciplinary

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### LAW TO PROMOTE THE ECOSYSTEM FOR START-UPS

The new Act to Promote the Ecosystem for Emerging Companies / Start-ups ("**Start-ups Act**") was finally published in Spain's Official State Gazette on 22 December 2022 and it entered into force the next day thereafter.

The main objective of the Start-up Act is to provide a specific regulatory framework to promote entrepreneurship and facilitate the creation and development of innovative start-ups. It establishes a number of very different incentives.

### **STATUS AS AN EMERGING COMPANY OR START-UP**

#### **REQUIREMENTS**

- The company must be less than five years old, although this limit is extended to seven years for companies in the biotechnology, energy, industrial or strategic sectors.
- The company must not be the result of a corporate merger, spin-off, transformation or carve-out that do not qualify as start-ups.
- The company must have its registered office, domicile or establishment in Spain.
- 60% of the workforce must have an employment contract in Spain.
- The corporate purpose of the start-up must be to solve a current problem or improve an existing situation.
- It is required that the company does not distribute or has not distributed dividends or returns, in the case of cooperatives.
- It is not listed on a regulated market.
- In the case of a company that is part of a group of companies, all the companies in the group must also meet the above requirements.
- The annual turnover of the company may not exceed EUR 10 million.
- The company must be up to date with its tax and social security payments. Likewise, it must be eligible to contract with the administration and never have been convicted of criminal offenses.

#### **THE COMPANY MUST FIRST BE EVIDENCED AS INNOVATIVE**

Spain's National Innovation Agency (ENISA) will be the authority that declares the company's innovative nature and, to do so, **it will evaluate the company's nature within a maximum of three months**. If that term expires without ENISA's having issued an express resolution in this regard, that will imply the start-up's innovative nature is confirmed through administrative silence.

Once ENISA assesses the start-up's nature, the company will then be registered with the Commercial Registry or Cooperatives Registry and ENISA will provide the documents that evidence the company meets the requirements. Obtaining said registration is the minimum requirement to be eligible for the benefits regulated by the new Act, notwithstanding the possibility that the Tax Administration may verify whether the company fulfills and continues to fulfill the requirements to be considered an "emerging company"/start-up.



### **THE APPLICABLE BENEFITS WILL END:**

- Upon termination of the company or if it is acquired by another company that is not deemed an "emerging company" / start-up.
- If the company fails to comply with any of the requirements.
- If any shareholder that directly or indirectly holds a stake of at least 5% of the capital has been convicted in a final judgment for not paying its taxes or social security; convicted of a criminal offense, or has been declared ineligible to contract with the public administration.
- If the start-up engages in activities that generate significant damage to the environment, according to EU Reg. 2020/852

## **TAX NEWS**

### **CORPORATE INCOME TAX INCENTIVES**

**Reduced rate of 15%** during the first fiscal year in which a positive taxable income is obtained and in the next three years thereafter, i.e. that rate is applicable for the first four years.

**Six to 12-month deferral of tax payments** for the first two fiscal years, during which the start-up will not be required to provide guarantees or to pay late interest. The relevant taxes will be paid within one month from the deferral's expiration.

**The start-up is not obliged to make tax payments on account** for the first two fiscal years in which the company earns taxable income.

### **TAX INCENTIVES FOR EMPLOYEES**

#### **IMPATRIATE TAX REGIME ("BECKHAM LAW")**

As of 1 January 2023, the requirements to benefit from the special tax regime for impatriate employees, popularly known as the "Beckham Law", will become easier:

- The period of non-residence prior to moving to Spain to be eligible for this regime is reduced to five **fiscal years** (it previously was 10).
- The law has established a longer list of reasons that allow the impatriate to qualify for the special regime:
  - Working remotely from Spain through just computer, telematic or telecommunication means or systems ("digital nomads"), with no need for the employer to issue a travel order or transfer. This circumstance is understood to be fulfilled in the case of **teleworkers with an international telework visa**.
  - Performing business activities classified as **entrepreneurial activities**.
  - **Highly qualified professionals** that provide services in Spain to start-ups or who carry out training, research, development and innovation activities, for which they receive a remuneration that represents more than 40% of their total income.

Regarding the latter two activities, the restriction arising from the fact that the impatriate cannot obtain income that would be deemed as revenue obtained through a permanent establishment located in Spanish territory will not be applicable. However, any income obtained from such



economic activities will be subject to taxation in Spain, irrespective of its source (worldwide income taxation), which was already the case.

- Becoming **director of a Spanish company, regardless of the direct or indirect stake they hold therein.**
- Becoming the **director of a holding company**, according to the terms of the Corporate Income Tax Act, **if the direct or indirect stake in such holding is less than 25%.**
- The benefits of the regime are now applicable to the impatriate's **descendants** under 25 years of age (or descendants of any age if they are disabled) and to the impatriate's **spouse** (or the parent of the descendants, if the partners are not married), if they meet the following requirements:
  - They've **moved to Spanish territory**, either with the impatriate or within the first fiscal year in which the latter applies this special regime, provided that they acquire tax residence in Spain as a result of the move.
  - They have not been residents in Spain **during the last five fiscal years.**
  - They do not obtain income through a **permanent establishment in Spain.**
  - The **sum of the net taxable income** for the impatriate's descendants or partners in each fiscal year is **less than the impatriate's.**
- The applicable scope of the exemption that is set out under the Personal Income Tax for certain in-kind remuneration has been broadened to include beneficiaries of this special regime.

### **REMUNERATIVE ARRANGEMENTS BASED ON THE DELIVERY OF SHARES OR STOCK OPTIONS**

As of 1 January 2023, the personal income tax that is applicable to the delivery of shares or stock options as remuneration for employees of start-ups has decreased as follows:

- **The exemption per employee per year** for the delivery of shares or stock options granted to the start-up employees **has increased from EUR 12,000 to EUR 50,000.** The only thing necessary for start-up employees to take the exemption is that the offer be made within the **company's general remuneration policy** and that it contribute to the employees' participation therein. In the case of **stock options**, the company must meet the **requirements** to be considered a start-up when the options are granted (and not when the shares are delivered).
- **A rule for assessing share value** has been included with regard to Personal Income Tax, so that the value to be used to value the shares will be the value in the company's last capital increase in the previous fiscal year. If a capital increase did not take place, then, the market value will be used.
- In order to defer **taxes on income earned in excess of the exemption threshold**, a **temporary special taxation rule** has been established for Personal Income Tax. In this regard, levying personal income tax on the part of the income that is in excess of the threshold will now take place when a liquidation event occurs (when the company is listed on a regulated market or when the stake is sold) or, if no such event occurs, when 10 years have elapsed from the date the shares were granted.

### **CARRIED INTEREST**

As of 1 January 2023, **carried interest** is regulated and is understood to be the income obtained directly or indirectly by the directors, employees or managers of closed-end alternative investment institutions or funds (as these are listed in the Start-up Act, such as venture capital funds and institutions), or of their managing companies, units, shares or other rights (including success fees) that grant special rights over the aforementioned closed-end collective investment funds and institutions (or the managing companies or institutions in their group).

Carried interest will be considered **earned income**. However, only **50% of the carried interest** will be included in the taxable income if the following requirements are met:



- The special economic rights must be conditional upon the remaining investors in the relevant institution obtaining a guaranteed minimum return, **as defined in the company's bylaws or articles of association.**
- **The carried interest is held for a period of five years**, unless it is transferred *mortis causa*, or it is sold early, is terminated, or totally or partially lost due to a change of the managing company. This requirement will also be applicable to the relevant institutions, when they own the company's units, shares or rights.

The application of this 50% of the carried interest may not be performed if the special economic rights come (directly or indirectly) from an institution that is resident in a country or territory classified as a "non-cooperative jurisdiction", or with which country or territory no regulations exist regarding mutual assistance or exchange of tax information.

## **TAX INCENTIVES FOR INVESTORS**

### **DEDUCTIONS IN THEIR PERSONAL INCOME TAX PAYMENTS**

As of 1 January 2023, deductions for investment in newly created companies have been increased, in order to benefit the investment ecosystem:

- Regarding the amount: **this deduction was increased to 50%** (from the previous 30%) for investments made in the same fiscal year. The **maximum allowed investment was increased to EUR 100,000 per year** (from the previous EUR 60,000), depending on the acquisition value of the relevant shares.
- In addition, investment in new companies may be made **during the first five years** of the company's life (as opposed to the three years previously envisaged).
- Specifically, for **Spanish start-ups**: i) the **investment period** is extended from five **to seven years** from their incorporation date; and ii) the partners or founders are not subject to any limitation regarding the percent they own in the start-up's capital ( either individually or jointly with their close relatives).

## **FORMAL OBLIGATIONS**

The Start-up Act introduces the following measures related to compliance with formal obligations

### **NEW REPORTING OBLIGATION FOR CORPORATE INCOME TAX (OR TAXES OF A SIMILAR NATURE)**

- Within the framework of corporate groups, the parent company of a Spanish group that prepares consolidated accounts and whose annual turnover has exceeded EUR 750 in the last two fiscal years must prepare, publish, deposit and make accessible a report on certain issues such as its income, employees, business, and the amounts paid that refers to Corporate Income Tax (or a tax of the same or similar nature).
- Branches incorporated in Spanish territory by companies that are not subject to the law of a Member State of the European Union must also comply with this obligation.

### **SIMPLIFICATION OF THE PROCESS TO OBTAIN A SPANISH TAX IDENTIFICATION NUMBER OR A FOREIGNER'S ID NUMBER**

- **Investors** in start-ups that **are not going to reside in Spain will not be required to obtain** a foreigner's identity number (NIE), and obtaining a **Spanish tax identification number (NIF) electronically from the tax authorities has also been facilitated.**

## **CORPORATE NEWS**

### **RELAXATION OF THE TREASURY STOCK REGIME**

Start-ups in the form of limited liability companies may authorize the **acquisition of their own shares** as an exception to the provisions of the Companies Act and the Employee-owned and Investee Companies Act. This exception can be applied by start-ups that decide to **deliver treasury shares** to their **directors, employees or any**



**other collaborators** of the company, for the sole purpose of implementing a **remuneration** plan. The requirements that must be met to apply this new treasury stock regime are those set out below:

- a) The treasury stock **may not exceed 20%** of the start-up's capital stock.
- b) The **Company's bylaws** must provide for a compensation system that involves share delivery.
- c) The **general shareholders meeting must approve** the compensation system. It must approve the maximum number of shares that may be allocated each year, the value of the shares to be taken as a reference, and the term of the compensation plan.
- d) The shares to be acquired under the compensation system must be **fully paid up**.
- e) After acquisition, the net worth of the shares may not be less than the amount of the company's share capital plus unavailable, legal or statutory reserves.
- f) The acquisition must take place within five **years from the date on which the general shareholders meeting** authorized it.

#### **SHORTER TERMS TO INCORPORATE AND PASS CORPORATE BYLAWS**

The **term** for **registering** start-ups and all their corporate documents is now **five business days**, counting from the day after its registration application entry is recorded or, as applicable, the day after the withdrawn document.

In addition, if **standard bylaws** are used, the registrar must issue its classification and **registration** within **six business hours** after the public deed is received telematically. Likewise, if start-ups use standard bylaws, they will benefit from **special notary public fees** and **registry fees**; in addition start-ups' publication in the Commercial Registry's Official Gazette ("BORME") will be **exempt from the BORME fees**.

Finally, the formalities required to register start-ups, as well as the tax and social security formalities required for the start-up to start its business and the other formalities set out in the regulations governing the Single Electronic Document can now all be carried out through said document.

#### **MODIFICATIONS TO THE DISSOLUTION REGIME DUE TO LOSSES**

Start-ups will **not be** subject to **dissolution** when they **incur losses** that reduce their net worth to less than half of their capital stock during the first three years after their incorporation. This exception will be applicable as long as it is not appropriate to request a declaration of bankruptcy.

#### **POSSIBILITY OF REGISTERING SHAREHOLDERS' AGREEMENTS**

The **shareholders' agreements** of start-ups, when they are limited liability companies, **will be registrable** and publishable at the commercial registry, as long as they do not contain unlawful clauses. Likewise, the clauses of the bylaws that include an ancillary obligation to execute the shareholders' agreement will be registrable, **provided that the content of the agreement is identified in such** a way that both existing shareholders and future shareholders can know its content.

### **LABOR NEWS**

#### **SOCIAL SECURITY REBATES FOR SELF-EMPLOYED EMPLOYEES**

Employees of an start-up included in the Free-lance Social Security Regime who simultaneously work as employees for another employer, will be entitled to a **100% rebate** on the contribution paid to the social security for the **minimum base** established for a **maximum period of three years** from the start of the self-employed activity in the start-up company



## **NEW DEVELOPMENTS IN IMMIGRATION**

The Start-up Act introduces **beneficial amendments** to the **residence and work permits** established under the "Ley de Emprendedores" (Entrepreneurs Act), **expanding the eligible cases** set out in said act to now include international teleworkers, as well as already existing investors, entrepreneurs, highly qualified professionals, researchers and employees whose work involves relocation. The main changes and new developments with regard to said act are listed below:

1. **Terms for resident permits.** In general terms, the initial residence permit for all the permits listed in the Entrepreneurs Act (e.g., investors, entrepreneurs or highly qualified professionals) extend their duration from two to three years. The term for renewing said permits continues to be two years; therefore, the accumulated time of residence between the initial residence (three years) and the renewed permit (two years), will allow the holder to apply for long-term residence at the end of the validity of the renewal..
2. In order to attract and promote entrepreneurship, the process for obtaining residence permits for entrepreneurs has been **simplified**, giving prominence to ENISA, which will be responsible for issuing the relevant report in connection with the entrepreneurial project. Said report will now be requested ex officio by the competent immigration office, whereas before it was the entrepreneur himself who had to request a report from the General Directorate of Commerce.
3. **The requirements** with respect to the residence permit for **highly qualified professionals** have **been changed** and the very concept of highly qualified professional is broadened. Now this authorization may be requested by companies that require the incorporation into Spanish territory of foreign professionals, whether they are graduates or postgraduates from universities and business schools of recognized prestige, or are graduates of advanced vocational training, or specialists with comparable professional experience of at least three years, while previously only candidates who had a graduate or postgraduate university degree or was going to occupy a management position in certain companies, qualified for this permit.
4. **International teleworkers:** This is a new and much anticipated immigration category. In the new regime, the nationals of a third country that are authorized to stay in Spain to work or carry out a professional activity remotely for companies located outside of Spain are now included. However, in certain cases the professional may also work for a company located in Spain, provided that the percentage of such work does not exceed 20% of the employee's total activity. Some of the requirements for this new permit are:
  - Employees must be graduates or postgraduates from universities or business schools of recognized prestige, graduates of recognized vocational training, or specialists who have at least three years professional experience comparable thereto.
  - The foreign company must also comply with certain requirements, such as proving that it has been in real and continuous activity for at least one year.
  - There are two options:
    - a. **Visa.** An international telework visa may be requested if the employee is working outside Spain. In this case the visa will have a maximum duration of one year and may then be modified to an international telework residence permit within 60 days prior to its expiration.
    - b. **Residence Permits.** If the employee works in Spain regularly, or has previously obtained the international telework visa, they will be able to request a residence permit for international telework. The aforementioned residence permit will be valid for three years and can be extended for two more.
5. The new act introduces **benefits for foreign students residing in Spain** and promotes their entrepreneurship in our country. The Start-up Act establishes that foreigners who have completed their studies in an institution of higher education and reached Level six of the European Qualifications Framework for degree accreditation may now remain in Spain for a non-extendable maximum period of 24 months, to seek employment that is appropriate to the level of studies they completed or to undertake a business project.



The changes made in terms of immigration require that regulatory instructions be developed to implement them in practice. The deadline for such regulatory **instructions to be ready is 31 March 2023**. Likewise, the indicated in said instructions will be referenced to the guaranteed minimum wage (SMI)

## **ADMINISTRATIVE LAW'S NEWS**

### **TEMPORARY PROBATIONARY LICENSES**

Start-ups operating in regulated sectors may apply to the administrative authority regulating their field of activity to request a temporary trial license which will allow them to carry out their business activities. The license will have a **maximum term of one year**.

The start-ups that obtain this temporary trial license must provide the users or consumers of their products/services with a written warning that informs them of the term of the license and obtains the users'/consumers' **express consent to start the temporary trial of the license**.

### **REGULATORY "SANDBOX"**

The concept of "sandboxes" (controlled testing grounds originally created to test web or software development projects) is now included in Spanish law to boost the digital market economy by providing for the technological innovations created by start-ups.

Through regulation, the administration will promote the creation of said "controlled" environments for limited periods of time, in order to evaluate the usefulness, viability and impact of technological innovations applied (i) to regulated activities; (ii) to the supply or provision of new goods and services; (iii) to new ways of supplying or providing the latter; or (iv) to alternative methods for their supervision and control by the competent authorities.

### **NATIONAL STATE AID FOR INNOVATION-BASED ENTREPRENEURSHIP**

The Start-up Act establishes a state aid system aimed at:

- a) Promoting the creation of start-up companies in Spain.
- b) Boosting start-ups' international expansion.
- c) Stimulating domestic and foreign investment in start-ups
- d) Stimulating collaboration among companies, increasing the participation of women and territories in the entrepreneurship phenomenon.

The **General State Administration, in cooperation with regional and local administrations, will promote the establishment of co-investment funds** to attract private capital and finance the different stages of start-ups' creation, growth and internationalization.

### **SPECIAL CONDITIONS IN RELATION TO SUBSIDIES FOR START-UPS**

When the granting of subsidies or advanced payments to the start-ups are conditioned upon the company establishing certain guarantees, such companies may benefit from a reduction of such guarantees in **exchange for reducing the percentage that the state aid or advance payment occupies therein**.





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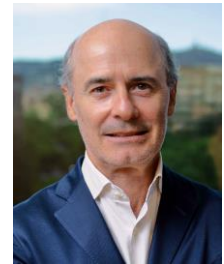
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